Nos. 92-757 and 92-938

In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

DAVID K. FLYNN
DENNIS J. DIMSEY
REBECCA K. TROTH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether Sections 101 and 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, apply to claims that were pending on the date of enactment.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Introduction and summary of argument	6
Argument:	
Sections 101 and 102 of the Civil Rights Act of 1991 apply to claims that were pending at the time of enactment	10
A. Textual analysis of the Act indicates that, except as otherwise specifically provided, the Act applies to pending cases	12
B. The legislative history does not express a clear legislative intention that the Act should not apply to pending cases	15
C. In the absence of clear evidence of congressional intent, it is proper for courts to presume that procedural and remedial provisions apply to pending cases	17
D. Sections 101 and 102 apply to petitioners' claims	22
1. Section 102 applies to Landgraf's sexual harassment claims	22
2. Section 101 applies to petitioners' claims in Rivers	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Ardestani v. *INS*, 112 S. Ct. 515 (1991)	21-22
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	22
Ayers v. *Allain*, 893 F.2d 732, vacated, 914 F.2d 676 (5th Cir. 1990)	27

Cases—Continued: Page

Baynes v. *AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992) 15
Beazell v. *Ohio*, 269 U.S. 167 (1925) 8, 19
Bennett v. *New Jersey*, 470 U.S. 632 (1985) .....
Bonet v. *Texas Co.*, 308 U.S. 463 (1940) 20
Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 3, 7, 8, 12, 18, 21
Bradley v. *School Board*, 416 U.S. 696 (1974) .. 3, 7, 8, 12, 17, 18, 21
Butts v. *City of New York Dep't of Housing Preservation & Dev.*, No. 92-7850 (2d Cir. Mar. 24, 1993) 14, 15
Chase Securities Corp. v. *Donaldson*, 325 U.S. 304 (1945) 21
Claridge Apartments Co. v. *Commissioner*, 323 U.S. 141 (1964) 19
Collett, Ex parte, 337 U.S. 55 (1949) 20
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 13
DeVargas v. *Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991) 27-28
EEOC v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) 11
Estate of Reynolds v. *Martin*, 985 F.2d 470 (9th Cir. 1993) 14, 15, 17, 28
FDIC v. *Wright*, 942 F.2d 1089 (7th Cir. 1991) 10
Fray v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) 6, 15, 16, 26
Freeborn v. *Smith*, 69 U.S. (2 Wall.) 160 (1865) .. 23
Gersman v. *Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992) 15
Greene v. *United States*, 376 U.S. 149 (1964) 12, 19-20
Hallowell v. *Commons*, 239 U.S. 506 (1916) 20
Hastings v. *Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980) 22, 23
Johnson v. *Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), petition for cert. pending, No. 92-737 .....3, 13, 15-16

Cases—Continued: Page

Kaiser Aluminum & Chemical Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 7, 12, 13, 17, 19, 20
Kremer v. *Chemical Construction Co.*, 456 U.S. 461 (1982) 24-25
Kungys v. *United States*, 485 U.S. 759 (1988) 14
Luddington v. *Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir.), petition for cert. pending, No. 92-977 ..... 15, 23
Lussier v. *Dugger*, 904 F.2d 661 (11th Cir. 1990) .. 27
Lytle v. *Household Manufacturing, Inc.*, 494 U.S. 545 (1990) 25, 26
Martin v. *Wilks*, 490 U.S. 755 (1989) 11
Meritor Savings Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 2
Miller v. *United States*, 294 U.S. 435 (1935) 19
Mojica v. *Gannett Co., Inc.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993) 6, 9, 25
Mozee v. *American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992) 5-6, 13-14, 16, 25, 26
O'Hare v. *General Marine Transport Corp.*, 740 F.2d 160 (2d Cir. 1984), cert. denied, 469 U.S. 1212 (1985) 26
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 5, 9, 10
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 11
Railroad Co. v. *Grant*, 98 U.S. 398 (1879) 20
Reding v. *FDIC*, 942 F.2d 1254 (8th Cir. 1991) 10
Runyon v. *McCrary*, 427 U.S. 160 (1976) 26
Russello v. *United States*, 464 U.S. 16 (1983) 13
Sampeyrac v. *United States*, 32 U.S. (7 Pet.) 222 (1833) 20
Schalk v. *Reilly*, 900 F.2d 1091 (7th Cir. 1990) 10
Society for the Propagation of the Gospel v. *Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) 12
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801) 18, 24
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 17, 21

Cases—Continued: Page

Union Pac. R.R. v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913) 20
United States v. *Burke*, 112 S. Ct. 1867 (1992) 23
United States v. *Fordice*, 112 S. Ct. 2727 (1992) 27
United States v. *Heth*, 7 U.S. (3 Cranch) 399 (1806) 20
United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (1928) 19
United States v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) 10
United States v. *Murphy*, 937 F.2d 1032 (6th Cir. 1991) 10
United States v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992) 7, 14
United States Department of Energy v. *Ohio*, 112 S. Ct. 1627 (1992) 21
United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 12
United States v. *Singer Co.*, 889 F.2d 1327 (4th Cir. 1989) 10
Vogel v. *City of Cincinnati*, 959 F.2d 594 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992) 6, 16
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989) 11
Womack v. *Lynn*, 504 F.2d 267 (D.C. Cir. 1974) 22

Constitution and statutes:

U.S. Const. Amend. VII 25
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 26
42 U.S.C. 2000e(b) 26
Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 27
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 1, 2, 5, 8, 10, 23
§ 2, 105 Stat. 1071 10
§ 3, 105 Stat. 1071 10
§ 101, 105 Stat. 1071 ..... 6, 7, 9, 10, 12, 16, 17, 25, 26
§ 102, 105 Stat. 1072 ..... 6, 7, 11, 12, 17, 22, 23, 24, 25

Statutes—Continued: Page

§ 102(a)(1), 105 Stat. 1072 ..... 2, 23
§ 102(b)(1), 105 Stat. 1073 ..... 11, 24
§ 102(b)(3), 105 Stat. 1073 11
§ 102(c), 105 Stat. 1073 2
§ 104, 105 Stat. 1074 11
§ 105, 105 Stat. 1074 11
§ 107, 105 Stat. 1075-1076 11
§ 108, 105 Stat. 1076-1077 11
§ 109, 105 Stat. 1078 11
§ 109(c), 105 Stat. 1078 ..... 7, 13, 14, 15
§ 113, 105 Stat. 1079 11
§ 204(b), 105 Stat. 1084 14
§ 303(b)(4), 105 Stat. 1089 14
§ 402(a), 105 Stat. 1099 ..... 7, 13, 14
§ 402(b), 105 Stat. 1099 ..... 7, 13, 14, 15
Education Amendments of 1972, Pub. L. No. 92-318 and 92-531, 86 Stat. 235 and 1051 17
False Claims Act, 31 U.S.C. 3729-3733 10
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 19
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 10
28 U.S.C. 1961 19
42 U.S.C. 1981 ..... 1, 4, 5, 6, 9, 10, 25, 26, 27, 28

Miscellaneous:

H. Black, *Handbook on the Construction and Interpretation of the Laws* (2d ed. 1911) 20
136 Cong. Rec.:
p. S9321 (daily ed. July 10, 1990) 27
p. S9336 (daily ed. July 10, 1990) 26
p. S16,419 (daily ed. Oct. 22, 1990) 16
136 Cong. Rec.:
pp. H6746-H6747 (daily ed. Aug. 3, 1990) 16
p. H6768 (daily ed. Aug. 3, 1990) 16
p. H6786 (daily ed. Aug. 2, 1990) 16

Miscellaneous—Continued:	Page
137 Cong. Rec. (daily ed. June 4, 1991):	
p. H3898	16
p. H3908	16
137 Cong. Rec. (daily ed. Mar. 12, 1991):	
p. S3021	16
p. S3023	16
137 Cong. Rec. S15,285 (daily ed. Oct. 28, 1991)	27
137 Cong. Rec. (daily ed. Oct. 29, 1991):	
p. S15,325	15
p. S15,338	24
p. S15,383	26, 27
137 Cong. Rec. (daily ed. Oct. 30, 1991):	
p. S15,483	27
p. S15,489	27
EEOC Policy Document No. 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991)	9
EEOC Policy Document No. 915.002, Rescission of Policy Guidance on Application of Damages Provisions of the Civil Rights Act to Pending Charges and Pre-Act Conduct (Apr. 19, 1993)	9
H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. (1990)	16
H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1 (1990)	16
2 N. Singer, *Sutherland Statutory Construction* (4th ed. 1986)	12, 20
Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936)	20
Wald, *Same Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195 (1983)	15

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

No. 92-938

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the application of the Civil Rights Act of 1991 (Act) to claims that were pending on November 21, 1991, the effective date of the Act. The Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as well as 42 U.S.C. 1981. The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share substantial re-

sponsibility for the enforcement of Title VII. In addition, the United States is a defendant in Title VII actions brought by federal employees. The Court's resolution of the question presented in these cases may also affect the application of other statutes enforced by the United States.

STATEMENT

1. In No. 92-757, petitioner Barbara Landgraf was employed by USI Film Products in Tyler, Texas, from September 1984 through January 1986. Throughout her employment, John Williams, a male co-worker, subjected her to "continuous and repeated inappropriate verbal comments and physical contact." 92-757 Pet. App. A2. Landgraf complained repeatedly about the harassment to her direct supervisor, who took no action. Eventually, she reported the harassment to the personnel manager. The personnel manager investigated and found that four other women "corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment." *Ibid.* Williams was not suspended or dismissed, as USI's policy required, but instead received a written reprimand and was transferred to another department. *Ibid.* Shortly thereafter, Landgraf resigned from the company and filed a charge of discrimination with the EEOC.

On July 21, 1989, Landgraf filed suit against USI alleging that she had been sexually harassed and constructively discharged in violation of Title VII. On May 22, 1991, following a bench trial, the district court entered judgment for the respondents. 92-757 Pet. 3-4. The court found that Landgraf had demonstrated that the sexual harassment "was severe enough to make USI a 'hostile work environment' for purposes of Title VII liability." 92-757 Pet. App. A2. The court nevertheless ruled that she was not entitled to any relief, because it found that she had not been constructively discharged as a result of the harassment. The district court found that

"the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign," *id.* at A4, and that Landgraf in fact resigned because of problems with her co-workers that were unrelated to the Title VII violation, *id.* at A4-A5.

Landgraf appealed, arguing that the district court erred in finding that she had not been constructively discharged. On November 21, 1991, while her appeal was pending, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Landgraf's counsel notified the court of appeals of the potential applicability of the new Act to her case, asserting that Sections 102(a)(1) and 102(c) of the Act entitled her to compensatory and punitive damages and the right to a jury trial. 92-757 Pet. App. A2.

The court of appeals affirmed. 92-757 Pet. App. A1-A10. It agreed that Landgraf had "suffered significant sexual harassment" that was "sufficiently severe to support a hostile work environment claim under Title VII." 92-757 Pet. App. A3 (citing *Meritor Savings Bank, FSB* v. *Vinson,* 477 U.S. 57 (1986)). The court of appeals agreed with the district court, however, that the sexual harassment was "insufficient to support a finding of constructive discharge." *Id.* at A5.

The court of appeals held that the enactment of the Civil Rights Act of 1991 did not entitle Landgraf to a jury trial in which she could seek compensatory and punitive damages. 92-757 Pet. App. A8-A10. The court first concluded that "there is no clear congressional intent on the general issue of the Act's application to pending cases." *Id.* at A8 (citing *Johnson* v. *Uncle Ben's, Inc.,* 965 F.2d 1363 (5th Cir. 1992), petition for cert. pending, No. 92-737 (filed Sept. 29, 1992)). The court then noted that the principles governing the application of new statutes to pending cases are "somewhat uncertain" in light of this Court's decisions in *Bradley* v. *School Board,* 416 U.S. 696 (1974), and *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988).

The court did not resolve this apparent conflict, however, because it found that even under the *Bradley* standard, the new provisions should not be applied in this case. 92-757 Pet. App. A8-A9.

The court was "not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial." 92-757 Pet. App. A9. The court also concluded that it would be a "manifest injustice" to allow Landgraf to collect compensatory or punitive damages under the new Act, finding that "the amended damage provisions of the Act are a seachange in employer liability for Title VII violations." 92-757 Pet. App. A9-A10.

2. In No. 92-938, petitioners Maurice Rivers and Robert Davison, who are black, were hired as garage mechanics by Roadway Express, Inc., in the early 1970s. In August 1986, Roadway managers directed Rivers and Davison to attend a disciplinary hearing about their work records. 92-938 Pet. App. 2a. Rivers and Davison refused to attend the hearing on the ground that Roadway had failed to provide adequate written notice pursuant to the terms of a collective bargaining agreement. Roadway held the hearing anyway and suspended both petitioners for two days. Petitioners then filed and won grievances challenging the lack of notice. *Ibid.* Shortly thereafter, Roadway's labor relations manager announced that he would hold disciplinary hearings within 72 hours. Rivers and Davison again refused to attend, alleging inadequate notice. On September 26, 1986, Roadway discharged Rivers and Davison, purportedly on the basis of their work records and their refusal to attend the hearings. *Id.* at 3a.

Rivers and Davison filed suit in February 1987, alleging, *inter alia,* that Roadway had discriminated against them on the basis of race in violation of 42 U.S.C. 1981 and Title VII. Petitioners argued that the discharges were racially motivated, and that they were fired in retaliation for enforcing their contractual rights in the grievance hearing in violation of Section 1981. The district court

initially denied Roadway's motion for summary judgment, but dismissed petitioners' Section 1981 discharge and retaliation claims after this Court decided *Patterson* v. *McLean Credit Union,* 491 U.S. 164 (1989). 92-938 Pet. App. 3a-4a, 23a-24a. The district court then held a bench trial on the Title VII claims. On October 18, 1990, the court entered judgment for respondent, finding that petitioners had failed to establish that their terminations were racially motivated. *Id.* at 4a; 92-938 Br. in Opp. App. A1-A13.

Petitioners appealed the dismissal of their Section 1981 claims, arguing that *Patterson* does not preclude a retaliatory discharge claim arising from attempts to enforce contractual rights. While the appeal was pending, Congress passed the Civil Rights Act of 1991. Rivers and Davison then argued that the new Act, reversing the effect of *Patterson,* should be applied to their Section 1981 claims. 92-938 Pet. App. 2a, 4a, 11a.

The court of appeals affirmed in part and reversed in part. 92-938 Pet. App. 1a-14a. It concluded that *Patterson* did not preclude petitioners' Section 1981 claim that they were fired in retaliation for attempting to enforce their contract rights. *Id.* at 7a-9a. The court of appeals affirmed the district court's dismissal of the discriminatory discharge claims under Section 1981, however, holding that *Patterson* applied to claims that were pending at the time of that decision. *Id.* at 6a.

The court also held that the Civil Rights Act of 1991 does not apply to claims that were pending at the time of enactment. 92-938 Pet. App. 11a-14a. The court noted the seemingly conflicting rules of construction established in *Bradley* and *Bowen,* and concluded that the legislative history of the Act "sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill." *Id.* at 11a-12a (citing *Mozee* v. *American Commercial Marine Serv. Co.,* 963 F.2d 929 (7th Cir.), cert. denied,

113 S. Ct. 207 (1992); *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel* v. *City of Cincinnati*, 959 F.2d 594 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992)). Following *Vogel*, the court held that *Bradley* does not apply where "substantive rights and liabilities" would be affected. 92-938 Pet. App. 13a. The court concluded that application of the Civil Rights Act of 1991 to petitioners' claims would "adversely affect substantive rights and liabilities." 92-938 Pet. App. 14a. The court rejected petitioners' argument that the retroactivity analysis depends upon the particular section at issue, and not whether the Act as a whole is considered retroactive. *Ibid.*[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Civil Rights Act of 1991 primarily to provide new procedures and remedies to victims of discrimination, including compensatory and punitive damages and jury trials under Title VII. The Act was largely a response to a series of decisions of this Court that Congress viewed as unduly restricting the relief available to plaintiffs alleging violations of their civil rights. The Act "creates few new rules against discrimination, focusing instead on outlining new procedures and remedies to use in new trials." *Mojica* v. *Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993), slip op. 9 (Cummings, J., dissenting from order granting rehearing en banc).

These cases present the question whether Sections 101 and 102 of the Act apply to cases that were pending on the date of enactment, as well as to cases filed after the date of enactment challenging pre-enactment con-

[1] Judge Siler dissented from the court's ruling that *Patterson* does not exclude claims under Section 1981 based on retaliation for attempting to enforce contract rights. 92-938 Pet. App. 14a-16a. That question is not at issue in this Court, which limited its grant of certiorari to the retroactivity question.

duct. In answering that question, the first step is to determine, if possible, what Congress intended. "[W]here the congressional intent is clear, it governs." *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990).

A textual analysis of the Act indicates that Sections 101 and 102 apply to pending cases. Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. 105 Stat. 1078, 1099. Moreover, Section 402(a) states that, "[e]xcept as otherwise specifically provided, this Act * * * shall take effect upon enactment." 105 Stat. 1099. Failure to apply the other provisions of the Act to pending cases would render the qualifying clause "[e]xcept as otherwise specifically provided" unnecessary, in contravention of "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

The legislative history of the Act does not contradict that analysis. Individual legislators addressed the retroactivity issue, but disagreed on how it should be resolved. Although the President vetoed an earlier bill containing an express retroactivity provision, Congress in turn failed to pass several bills containing express anti-retroactivity provisions.

Even if the text of the Act were not clear on the point, it would be appropriate to apply Sections 101 and 102 to pending cases. In deciding whether new statutes should govern pre-enactment conduct in the absence of clear evidence of congressional intent, courts have perceived a conflict between *Bradley* v. *School Board*, 416 U.S. 696 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bradley*, a case involving attorney's fees, the Court affirmed "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest

injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. In *Bowen*, in which the Department of Health and Human Services attempted to recapture payments made to hospitals under prior regulations, the Court said that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208.

These cases can be reconciled. In *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), the Court held that the "substantive provisions of the 1978 Amendments to Title I of the Elementary and Secondary Education Act" do not apply to funds spent more than six years before enactment. 470 U.S. at 633-634. The Court distinguished the case from *Bradley*, relying on a "venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639.

Bennett suggests a rule that is both fair and consistent with Congress's purpose in enacting new legislation: when Congress has not prescribed how new statutes are to be applied to pending cases, substantive provisions (such as those prohibiting conduct that was not illegal before) should not be applied to pending cases. On the other hand, procedural and remedial provisions may be applied to pending cases unless doing so would result in "manifest injustice." *Bradley*, 416 U.S. at 711. In most cases, it is not manifestly unjust to allow victims of discrimination to benefit from the remedies or procedures that Congress has authorized. In particular, there is no injustice in requiring the wrongdoer, rather than the victim, to bear the costs of injury caused by discriminatory conduct that was unlawful at the time it occurred.

In our view, the provisions of the Civil Rights Act of 1991 at issue here should be applied to petitioners' claims. Landgraf seeks damages for sexual harassment that the

district court found constituted a violation under existing law. She was denied a remedy for the harassment, even though both lower courts found it to be "significant" and "severe." 92-757 Pet. App. A2-A3. Allowing her compensation for her injury, as Congress provided in Section 102, comports with basic notions of fairness. Similarly, the *Rivers* petitioners asserted a cause of action under Section 1981 for discriminatory discharge, which the district court dismissed after this Court decided *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). In enacting Section 101, Congress plainly registered its dissatisfaction with this Court's decision in *Patterson*. Because Congress clearly intended to deny *Patterson* further effect, and because in the present context Section 101 provides a remedy for conduct that was illegal under Title VII, the new Act should be applied to petitioners' claims.[2]

[2] Shortly after the Act was passed, the EEOC issued a Policy Guidance announcing that the EEOC would not process charges for damages for conduct that occurred before November 21, 1991. EEOC Policy Document No. 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991). That document did not purport to explain an area in which the EEOC has expertise (*i.e.*, Title VII). Instead, it represented the EEOC's analysis of this Court's decisions on retroactivity. The EEOC's initial conclusion that it would follow *Bowen* because it was decided after *Bradley* does not preclude a different analysis here, particularly in light of the EEOC's recent rescission of the Policy Guidance. EEOC Policy Document No. 915.002, Rescission of Policy Guidance on Application of Damages Provisions of the Civil Rights Act to Pending Charges and Pre-Act Conduct (Apr. 19, 1993).

In addition, the United States has taken the position in a number of lower courts that the provisions of the Act generally do not apply to conduct that occurred before its effective date. See, *e.g.*, U.S. Br. in *Van Meter* v. *Barr*, No. 92-5046 (D.C. Cir.); U.S. Br. in *Mojica* v. *Gannett Co.*, Nos. 91-3921 and 92-1104 (7th Cir.). We have re-examined our position and have concluded that it is

ARGUMENT

SECTIONS 101 AND 102 OF THE CIVIL RIGHTS ACT OF 1991 APPLY TO CLAIMS THAT WERE PENDING AT THE TIME OF ENACTMENT

The President signed the Civil Rights Act of 1991 into law on November 21, 1991. Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." § 2, 105 Stat. 1071. Accordingly, the Act "provide[s] appropriate remedies for intentional discrimination and unlawful harassment in the workplace." § 3, 105 Stat. 1071. Many provisions of the Act "respond to recent decisions of [this] Court by expanding the scope of relevant civil rights statutes in order to provide adequate protections to victims of discrimination." *Ibid.*

The Act comprises a variety of provisions addressing different issues that have arisen under the civil rights statutes in recent years. Section 101 of the Act responds to *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and provides that the phrase "make and enforce contracts" in 42 U.S.C. 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072. Section 102 amends Title VII to allow victims of discrimination to seek compensatory and punitive damages, and permits either party to seek a jury trial if such damages are sought. 105 Stat. 1072.[3] Sections 104 and 105, 105 Stat. 1074, respond to this Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), and govern burdens of proof in disparate impact cases. Section 106, 105 Stat. 1075, prohibits altering the results of employment-related test scores on the basis of race, color, religion, sex, or national origin. Section 107, 105 Stat. 1075-1076, addresses the type of "mixed motive" case at issue in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and limits relief where the employer proves that the same action would have been taken in the absence of the discrimination. Section 108, 105 Stat. 1076-1077, responds to *Martin* v. *Wilks*, 490 U.S. 755 (1989), by limiting the ability of non-parties who received adequate notice to challenge Title VII judgments and consent decrees. Section 109, 105 Stat. 1077-1078, responds to *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), by extending Title VII to U.S. citizens working abroad. In Section 113, 105 Stat. 1079, Congress expanded the definition of attorney's fees to include expert fees.

---

both incorrect and contrary to the longstanding position of the government with respect to statutory retroactivity. See, *e.g.*, U.S. Br. at 17 in *Bennett* v. *New Jersey*, No. 83-2064 ("statutes affecting substantive rights or obligations are considered prospective only," while statutes "involving procedures, remedies, or prospective relief * * * appl[y] to pending cases"); *United States* v. *Murphy*, 937 F.2d 1032, 1037-1038 (6th Cir. 1991) (amendments to False Claims Act, 31 U.S.C. 3729-3733); *United States* v. *Singer Co.*, 889 F.2d 1327, 1333-1334 (4th Cir. 1989) (same); *Schalk* v. *Reilly*, 900 F.2d 1091, 1096 (7th Cir. 1990) (amendments to Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *United States* v. *Monsanto Co.*, 858 F.2d 160, 175 (4th Cir. 1988) (same); *Reding* v. *FDIC*, 942 F.2d 1254, 1256-1257 (8th Cir. 1991) (Financial Institutions Reform, Recovery, and Enforcement Act of 1989); *FDIC* v. *Wright*, 942 F.2d 1089, 1094-1097 (7th Cir. 1991) (same).

[3] Section 102 permits a plaintiff to recover compensatory and punitive damages in an amount limited by the size of the employer. Plaintiffs may recover no more than $50,000 if the employer has 15 to 100 employees, no more than $100,000 if the employer has more than 100 but fewer than 201 employees, no more than $200,000 if the employer has more than 200 but fewer than 501 employees, and no more than $300,000 if the employer has more than 500 employees. § 102(b)(3), 105 Stat. 1073. No punitive damages may be awarded against government entities. § 102(b)(1), 105 Stat. 1073.

A. Textual Analysis Of The Act Indicates That, Except As Otherwise Specifically Provided, The Act Applies To Pending Cases

The issue in these cases is whether particular provisions of the Act—Sections 101 and 102—apply to cases that were pending on the date of enactment and that arise out of conduct that occurred before the date of enactment. The issue is often framed in terms of whether the provisions of the Act apply "retroactively."[4] The first step in the inquiry is to determine, if possible, the intent of Congress. "[W]here the congressional intent is clear, it governs," subject only to constitutional limitations. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990) (citing *Bradley* v. *School Board*, 416 U.S. 696, 716-717 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative

[4] The terminology used in this area—"retroactive" (or its synonym, "retrospective") versus "prospective" application of law—is not always used consistently. The classic definition was stated by Justice Story in *Society for the Propagation of the Gospel* v. *Wheeler*, 22 Fed. Cas. 756, 757 (C.C.D.N.H. 1814) (No. 13,156):

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

Accord 2 N. Singer, *Sutherland Statutory Construction* § 41.01, at 337-338 (4th ed. 1986). This understanding holds whether the change in law occurs during the pendency of litigation, *e.g.*, *Greene* v. *United States*, 376 U.S. 149 (1964), or precedes any litigation, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982). It should be noted, however, that "retroactive" is sometimes defined more restrictively, to mean "the application of a change in law to overturn a judicial adjudication of rights that has already become final." *Kaiser Aluminum*, 494 U.S. at 864 (White, J., dissenting).

intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum*, 494 U.S. at 835 (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Textual analysis of the Act indicates that the Act applies to pending cases (and to cases filed after enactment based on pre-enactment conduct) except as otherwise specifically provided by Congress. Section 402 of the Act, the "Effective Date" provision, states:

> (a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. 1099. In addition, Section 109(c), part of the section expanding Title VII's coverage to U.S. citizens working overseas, provides that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." 105 Stat. 1078.

Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. The inclusion of those provisions suggests that the other provisions of the Act are retroactive. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Some courts have concluded that Sections 109(c) and 402(b) merely ensure that certain provisions of the Act will not be applied retroactively. See, *e.g.*, *Johnson* v. *Uncle Ben's, Inc.*, 965 F.2d at 1372-1373; *Mozee* v. *Ameri-*

can Commercial Marine Service Co., 963 F.2d 929, 932-933 (7th Cir.), cert. denied, 112 S. Ct. 207 (1992). But that construction of the statutory language is inconsistent with Section 402(a). Section 402(a) provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. 1099. Standing alone, the phrase "shall take effect upon enactment" might mean that the Act applies retroactively, or merely that it applies to conduct that occurs on or after the effective date. As the Ninth Circuit recognized in *Estate of Reynolds* v. *Martin*, 985 F.2d 470 (1993), however, that ambiguity disappears when one considers the qualifying clause "[e]xcept as otherwise specifically provided." It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). See also *Kungys* v. *United States*, 485 U.S. 759, 778 (1988). "The qualifying clause of Section 402(a), if it is to mean anything, must mean that the Act contains counterexamples that specifically provide for exceptions to the general rule enunciated elsewhere in section 402(a)." *Reynolds*, 985 F.2d at 473. The express prospectivity provisions of Sections 109(c) and 402(b) are the only plausible exceptions to the general rule of Section 402(a).[5] Accordingly, the text of the statute indicates that, except as otherwise

[5] In *Butts* v. *City of New York Dep't of Housing Preservation and Dev.*, No. 92-7850 (2d Cir. Mar. 24, 1993), the court suggested that the qualifying clause of Section 402(a) might apply to Section 204(b) (which requires the Glass Ceiling Commission to submit a report not later than 15 months after enactment) and to Section 303(b)(4) (which requires an official to be appointed within 90 days after enactment). 105 Stat. 1084, 1089. That suggestion is unpersuasive. The time periods specified in Sections 204(b) and 303(b)(4) began to run on November 21, 1991. Consequently, those provisions were effective upon enactment and cannot serve as counterexamples to the general rule of Section 402(a).

specifically provided (in Sections 109(c) and 402(b)), the Act applies to pending cases.

B. The Legislative History Does Not Express A Clear Legislative Intention That The Act Should Not Apply To Pending Cases

The legislative history of the Act does not undermine the foregoing textual analysis. No conference report or committee reports accompanied the Act. Although individual legislators addressed the retroactivity question, they did not agree on how it should be resolved. See *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370, 1376 n.10 (8th Cir. 1992) (collecting citations to conflicting statements and "interpretive memoranda" of various legislators). Any attempt to draw inferences from this welter of conflicting statements would validate the observation of the late Judge Leventhal that reviewing legislative history is like "looking over a crowd and picking out your friends." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Indeed, Senator Danforth, an opponent of retroactivity, candidly stated (137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991)):

> [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

Most courts of appeals have heeded that warning and properly refused to accord any weight to the Act's legislative history, in which one can find ample support for either position.[6] In *Fray*, however, the Eighth Circuit

[6] See *Luddington* v. *Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir.), petition for cert. pending, No. 92-977 (filed Dec. 3, 1992); *Butts* v. *City of New York*, No. 92-7850 (2d Cir. Mar. 24, 1993), slip op. 2219; *Reynolds*, 985 F.2d at 477; *Baynes* v. *AT&T Technologies, Inc.*, 976 F.2d 1370, 1372 (11th Cir. 1992); *Gersman* v. *Group Health Ass'n*, 975 F.2d 886, 892 (D.C. Cir. 1992); *John-*

concluded that the legislative history demonstrated that Section 101 should not be applied retroactively because the President had vetoed an earlier bill containing an explicit retroactivity provision.[7] In that court's view, "[w]hen a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only." 960 F.2d at 1378. The Eighth Circuit overlooked the fact that Congress failed to pass bills containing explicit anti-retroactivity provisions.[8] Consequently, the legislative history does not reveal a clear congressional intention that the Act should not be applied retroactively.

---

son, 965 F.2d at 1372; *Mozee*, 963 F.2d at 934; *Vogel* v. *City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992).

[7] In 1990, Congress passed a bill that expressly applied to pending cases, as well as to certain cases in which final judgment had been entered and the time to appeal had expired. H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 9 (1990). The President vetoed the bill and referred to the retroactivity provision as "unfair." 136 Cong. Rec. S16,419 (daily ed. Oct. 22, 1990). The veto was sustained.

[8] In early 1991, Senator Dole introduced a bill containing language expressly limiting the new provisions to conduct that occurred after enactment. 137 Cong. Rec. S3021, S3023 (daily ed. Mar. 12, 1991). The Senate never voted on the bill. In June 1991, Representative Michel proposed the same anti-retroactivity language as part of a substitute bill in the House, but the substitute was rejected by a vote of 266 to 162. 137 Cong. Rec. H3898, H3908 (daily ed. June 4, 1991).

Proposals to include express anti-retroactivity provisions in the 1990 bill were also unsuccessful. The Michel-LaFalce bill would have exempted all pre-existing claims from coverage. 136 Cong. Rec. H6746-H6747 (daily ed. Aug. 3, 1990). That bill was rejected by a vote of 238 to 188. 136 Cong. Rec. H6768 (daily ed. Aug. 3, 1990). Two other proposals to limit the retroactive effect of the legislation were also unsuccessful. See 136 Cong. Rec. H6786 (daily ed. Aug. 2, 1990) (statement of Rep. Moorhead); H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1, at 90 (1990).

Although individual legislators had different beliefs about the meaning of the Act, "those individual members' beliefs [are] unimportant, given the clear text of the Act." *Reynolds*, 985 F.2d at 478.

C. In The Absence Of Clear Evidence Of Congressional Intent, It Is Proper For Courts To Presume That Procedural And Remedial Provisions Apply To Pending Cases

Even if the textual analysis set forth above were not dispositive, it would nevertheless be appropriate to apply Sections 101 and 102 in these cases. Although this Court has noted an "apparent tension" in its prior decisions concerning the retroactive effect of statutes, *Kaiser Aluminum*, 494 U.S. at 837, the tension is just that—more apparent than real. Under this Court's decisions, the presumption against retroactive application of new statutes generally applies only to substantive provisions. In contrast, procedural and remedial provisions generally apply to pending cases and to cases filed after the effective date of the legislation.

1. In *Bradley* v. *School Board*, 416 U.S. 696 (1974), a unanimous Court held that the attorney's fee provisions of the Education Amendments of 1972 could be applied in a case pending on appeal to allow plaintiffs to recover attorney's fees incurred prior to the effective date of the Act. The Court relied on "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.[9]

---

[9] The Court in *Bradley* relied on its prior decision in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). In *Thorpe*, the Department of Housing and Urban Development had issued a circular while the petitioner's case was pending in this Court. The circular required local housing authorities to afford tenants in federally assisted housing projects prior notice of the reasons for an eviction

In *Bradley*, the Court identified three factors relevant to determining whether applying the law in effect at the time of the court's decision would result in manifest injustice: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. As to the first concern, the Court agreed with Chief Justice Marshall's statement in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801), that in "great national concerns * * * the court must decide according to existing laws," although the courts should "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties * * * in mere private cases between individuals." 416 U.S. at 717, 719. As to the second concern, the Court asked whether application of an intervening change in the law "would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. The third concern "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Ibid.*

2. In *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), the Department of Health and Human Services (HHS) issued a cost-limit schedule under the Medicare Act that would have recouped payments already made to hospitals under an earlier version of the regulations. The Court unanimously held that HHS had no statutory authority to promulgate retroactive regulations. The Court observed that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at

---

and an opportunity to respond. The Court held that the circular applied to petitioner, even though the housing authority had already secured an eviction order that had been affirmed by the North Carolina Supreme Court.

208 (citing *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944); *Miller* v. *United States*, 294 U.S. 435, 439 (1935); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928)).

3. In *Kaiser Aluminum*, 494 U.S. at 827, the Court considered whether the postjudgment interest provisions of the Federal Courts Improvement Act of 1982, amending 28 U.S.C. 1961, applied to judgments entered before the effective date of the Act. In *Kaiser Aluminum*, the Court was not required to "reconcile" the "apparent tension" between *Bradley* and *Bowen*, because the language of the statute "evidence[d] clear congressional intent that amended § 1961 is not applicable to judgments entered before its effective date." 494 U.S. at 837-838.

4. The Court's decision in *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), provides a basis for resolving the apparent tension between *Bowen* and *Bradley*. In *Bennett*, the Court held that the "substantive provisions" of the 1978 Amendments to Title I of the Elementary and Secondary Education Act did not apply "retroactively for determining if Title I funds were misused during the years 1970-1972." 470 U.S. at 633-634. The Court concluded that "[b]oth the nature of the obligations that arose under the Title I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively." 470 U.S. at 638. The Court noted *Bradley*'s express limitation that an "intervening change" should not apply to a pending action when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 470 U.S. at 639 (quoting *Bradley*, 416 U.S. at 720). "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639. See also *Greene* v. *United States*, 376 U.S. 149,

160 (1964) ("a retrospective operation will not be given to a statute which interferes with antecedent rights"); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (same); *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (same).

Bennett is consistent with a long line of decisions of this Court applying new statutory provisions that are procedural or remedial in nature in pending litigation. See, *e.g.*, *Ex parte Collett*, 337 U.S. 55, 71 (1949) (*forum non conveniens* rule); *Bonet* v. *Texas Co.*, 308 U.S. 463, 467 (1940) (method of collecting compensation awards); *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916) (statute transferring jurisdiction from district court to executive agency); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879) (statute conferring exclusive authority on Secretary of the Interior); *Sampeyrac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed."). See also 2 N. Singer, *Sutherland Statutory Construction* § 41.04, at 349 (4th ed. 1986) (procedural statutes and remedial provisions that do not take away vested rights apply to pending actions); H. Black, *Handbook on the Construction and Interpretation of the Laws* § 120, at 403-408 (2d ed. 1911) (laws authorizing new or enlarged remedies for existing causes of action or changing rules of procedure or evidence apply to pending actions, unless vested rights would be disturbed).[10]

[10] The decisions discussed in Justice Scalia's concurring opinion in *Kaiser Aluminum*, see 494 U.S. at 842-844, are not to the contrary. Those decisions concerned the application of what were deemed to be statutes changing substantive rights, rather than procedural or remedial statutes, to pending cases. An article cited by Justice Scalia makes that point clear. See 494 U.S. at 842. The author of the article explains that retroactivity doctrine in the United States developed as "an inhibition against a construction which * * * would violate vested rights." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 784 (1936).

Accordingly, substantive changes—*e.g.*, a statutory change that makes illegal conduct that formerly was legal—should not be applied to a case in which the underlying conduct occurred before the statute's effective date. See *Bowen*, 488 U.S. at 204. But procedural or remedial changes should be applied to a pending case unless Congress has specified otherwise, or unless their application would result in "manifest injustice." *Bradley*, 416 U.S. at 711; *Thorpe*, 393 U.S. at 282. This approach to reconciling *Bradley* and *Bowen* focuses on the nature of the particular statutory provision at issue, rather than on the statute as a whole. It reflects the reality that Congress may enact statutes that contain a mixture of substantive, procedural, and remedial provisions. We therefore disagree with the suggestion (see 92-938 Pet. App. 14a) that courts should always make a single retroactivity determination for an entire statute.

We acknowledge that it will not always be obvious whether a provision should be classified as substantive, procedural, or remedial. But as the Court noted in another context in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), "[t]he abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." In addition, we do not suggest that any new provision that may be labeled "remedial" or "procedural" must be applied to all pending cases. Courts have flexibility not to apply a new procedural or remedial provision in order to avoid manifest injustice.[11]

[11] In addition, a different presumption may be appropriate if the suit is against the government, because statutory waivers of sovereign immunity are strictly construed, and must be express rather than implied. See *United States Department of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *Ardestani* v. *INS*, 112 S. Ct.

D. Sections 101 and 102 Apply To Petitioners' Claims

1. *Section 102 Applies to Landgraf's Sexual Harassment Claims*

In *Landgraf*, both the court of appeals and the district court held that petitioner was sexually harassed in violation of Title VII. While the case was pending on appeal, Congress passed the Act. Section 102 of the Act permits victims of sexual harassment to recover compensatory and punitive damages, as well as backpay. The Act thus expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty.

Because compensatory damages are an additional remedy for intentional misconduct that was illegal under Title VII before the effective date of the 1991 Act, applying the new provisions to pending cases is appropriate under *Bradley* and *Bowen*. "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known." *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980) (removal of ceiling for workers' compensation disability is remedial and immediately applicable). See also *Womack* v. *Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974) (new remedy for discrimination applied to pending case because federal employees' "right to be free of such discrimination has been assured for years") (emphasis omitted). Thus, while "[r]etroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expecta-

515, 520 (1991). See also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit only by making its intention unmistakably clear in the language of the statute.").

tion upon which persons acted," changes in remedies "often do not involve the same degree of unfairness." *Hastings*, 628 F.2d at 93.[12]

The court of appeals concluded that applying the damages provisions of Section 102 to conduct that occurred before the effective date of the Act would be unfair to employers who did not foresee that they might be liable for more than backpay. See 92-757 Pet. App. A10 (compensatory damages represent "a seachange in employer liability"); see also *Luddington*, 966 F.2d at 228-229. But Section 102 applies only to intentional acts of discrimination that were illegal under Title VII at the time they were committed. "[T]here is no such thing as a vested right to do wrong." *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1865). Consequently, it is not unfair to require employers to compensate the victims of illegal discrimination for injury caused by the employer's illegal conduct. Indeed, *Bradley* authorized basically comparable relief (an award of previously unauthorized attorney's fees, which would not have been incurred but for the wrongdoer's unlawful conduct).[13]

[12] In holding that backpay awards are taxable as ordinary income in *United States* v. *Burke*, 112 S. Ct. 1867, 1874 & n.12 (1992), the Court noted that the damages provisions of the Civil Rights Act of 1991 reflect a "marked change in [Congress's] conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit." That statement does not address the question whether Section 102 should be considered "substantive" in the context of the Act's application to pending claims for make-whole relief.

[13] We think it is a much different and more difficult question whether the punitive damages provisions of Section 102 should be applied to cases involving conduct that occurred prior to the effective date of the Act. By definition, punitive damages do not merely compensate the victim for his or her injury. And we are not aware of any statute in which Congress has explicitly applied a provision allowing punitive damages to conduct that occurred before the statute was enacted—a consideration relevant to the

Concern for employers must be balanced against concern for the victims of intentional discrimination. If the employer does not bear the cost of intentional discrimination, that cost will be borne by the victim. In striking that balance, it is important to bear in mind that Title VII cases are not "mere private cases between individuals," *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110, but instead are concerned with unlawful discrimination, one of the greatest of our national concerns. In enacting the compensatory damages provisions of Section 102, Congress determined that the employer, rather than the victim, should bear the full cost of the discrimination. 137 Cong. Rec. S15,338 (daily ed. Oct. 29, 1991) (statement of Sen. DeConcini) (Congress intended to "place the injured party, inasmuch as possible, in the same position he or she would have been in the absence of the discriminatory act against the person"). There is nothing unjust about holding the wrongdoer responsible for injuries caused by conduct that has been illegal for almost 30 years. Accordingly, *Landgraf* should be remanded for a hearing on appropriate damages under Section 102.[14]

---

question of presumed legislative intent. We note, however, that any potential unfairness to employers is mitigated by Section 102 (b) (1), which allows the jury to award punitive damages only if the plaintiff demonstrates that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The courts below concluded that Section 102 as a whole should not be applied to pre-enactment conduct, and therefore did not consider the arguments for drawing a distinction between compensatory and punitive damages. We believe it would be appropriate for the Court to follow its usual course and not address a question that was not considered or decided by the courts below.

[14] In cases in which the district court entered an error-free judgment for the defendant prior to the Act's effective date, we do not believe plaintiffs are entitled to retrial merely on the ground that a jury might reach a different result as to liability. Cf. *Kremer*

2. *Section 101 Applies to Petitioners' Claims in* Rivers

In *Rivers*, the conduct at issue occurred before the effective date of the Act and before the Court decided *Patterson*. While the case was pending in the district court, this Court decided *Patterson*. The district court dismissed the Section 1981 discriminatory discharge claim in light of *Patterson*. While the case was pending on appeal, Congress passed the new Act.

There is no doubt that Section 101 expands the scope of Section 1981 to cover conduct that did not violate Section 1981 as construed by this Court in *Patterson*. In most cases, however—including this one—Section 101 applies to conduct that was already illegal under Title

---

v. *Chemical Construction Co.*, 456 U.S. 461, 481 (1982) (prior determination against Title VII plaintiff in state proceedings bars Title VII claim, by collateral estoppel, unless there is reason to doubt quality, extensiveness, or fairness of procedures followed in prior litigation). If the district court has entered judgment for the plaintiff on the liability issue, however, we believe cases on appeal should be remanded for a determination of damages. Because Section 102 provides for jury trials in cases in which plaintiffs seek compensatory and punitive damages, it is arguable that Seventh Amendment considerations require that defendants in such a situation have an opportunity to relitigate the liability issue before a jury. Cf. *Lytle* v. *Household Manufacturing, Inc.*, 494 U.S. 545 (1990) (Seventh Amendment precludes according collateral-estoppel effect to district court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims). In our view, the considerations set out above warrant application of Sections 101 and 102 to pending cases, even if turns out that, in limited circumstances, the entire case must be retried. In the alternative, however, the Court might hold that the new provisions should be applied to pending cases unless their application would require a retrial. See *Mojica* v. *Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993) (Cummings, J., dissenting from order granting rehearing en banc) (suggesting that the Act should be applied to pending cases that had not yet been tried); *Mozee*, 963 F.2d at 937 (same).

VII long before November 21, 1991.[15] *Fray*, 960 F.2d at 1378 (conduct covered by Section 101 "was clearly actionable under Title VII"); *Mozee*, 963 F.2d at 941 (Cudahy, J., dissenting) ("Section 101 merely provides new remedies for old wrongs."); see also *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 171 (2d Cir. 1984), cert. denied, 469 U.S. 1212 (1985) (ERISA amendment awarding interest and attorney's fees applies to pending case where employer was liable under a different provision before the amendment). Consequently, "application of § 101 to [a] pending case would neither alter the rights and expectations of the parties nor disturb previously vested rights." *Fray*, 960 F.2d at 1378.[16]

In addition, Congress viewed Section 101 as restoring a remedy for Section 1981 violations that was eliminated by *Patterson*, which denied remedies to victims of discrimination in hundreds of cases that were pending at the time of the decision. See 136 Cong. Rec. S9336 (daily ed. July 10, 1990) (statement of Sen. Hatch); 137 Cong.

[15] In the present case, the district court ruled that the employer was not liable under Title VII. The court of appeals nonetheless properly ruled that the district court's holding under Title VII did not have a collateral estoppel effect on the Section 1981 claims. See *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545 (1990). Because the Sixth Circuit has remanded the other Section 1981 issue to be tried before a jury, application of the Act would not require the district court to conduct additional proceedings. See 92-938 Pet. App. 9a-10a.

[16] Not all conduct that is proscribed by Section 101 was also unlawful under Title VII or another civil rights law. For example, Title VII does not apply to employers with fewer than 15 employees. 42 U.S.C. 2000e(b). Moreover, Section 1981 is not limited to the employment context. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Under the view we advance, Section 101 would not apply to conduct that was not unlawful at the time it occurred. In addition, punitive damages were not available under Title VII prior to the Act. If the Court were to conclude that punitive damages should not be available under Section 102 to plaintiffs injured by pre-Act conduct, see note 13, *supra*, we believe that the same result would be appropriate under Section 101.

Rec. S15,383 (daily ed. Oct. 29, 1991) (statement of Sen. Jeffords); 136 Cong. Rec. S9321 (daily ed. July 10, 1990) (statement of Sen. Kennedy). As Senator Leahy described the result of *Patterson* (137 Cong. Rec. S15,489 (daily ed. Oct. 30, 1991)):

> If, for example, an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in Patterson versus McLean Credit Union, the Civil Rights Act of 1991 would remedy this injustice.

See also 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson) ("almost everyone agree[d]" that *Patterson* needed to be "overturn[ed]"); 137 Cong. Rec. S15,383 (Oct. 29, 1991) (statement of Sen. Jeffords) ("[e]very civil rights proposal made over the past year-and-a-half has included a Patterson reversal as one of its terms"); 137 Cong. Rec. S15,285 (Oct. 28, 1991) (statement of Sen. Seymour) (bill restoring remedies under Section 1981 was "noncontroversial"). Where Congress unequivocally finds that a recent Supreme Court decision unfairly denies a remedy for discrimination, it is proper for the courts to infer that Congress intended for the curative legislation to apply to pending cases, and to deny the contrary decision any further effect. Cf. *Lussier* v. *Dugger*, 904 F.2d 661 (11th Cir. 1990) (Civil Rights Restoration Act of 1987 reversing *Grove City* decision applied to pending case); *Ayers* v. *Allain*, 893 F.2d 732, 754-755 & n.116 (5th Cir.), vacated on other grounds, 914 F.2d 676 (5th Cir. 1990) (en banc), vacated *sub nom. United States* v. *Fordice*, 112 S. Ct. 2727 (1992) (same). But see *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir.

1990), cert. denied, 111 S. Ct. 799 (1991). As the Ninth Circuit observed in *Reynolds*, it "would seriously undermine Congress' stated intent" if the Court were to hold that "the decisions [Congress] repudiated would live on in the federal courts for * * * years." 985 F.2d at 475-476. See also *Mojica*, slip op. 12 (Cummings, J., dissenting from order granting rehearing en banc) ("It would be sophistry to suggest that *Patterson* should have lingering effect in new civil rights cases for years to come, when Congress has so emphatically expressed its disapproval of that decision.").

CONCLUSION

The judgments of the courts of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

DAVID K. FLYNN
DENNIS J. DIMSEY
REBECCA K. TROTH
Attorneys

DONALD R. LIVINGSTON
General Counsel
Equal Employment
Opportunity Commission

APRIL 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60263